UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

MILLENNIUM MAINTENANCE & ELECTRICAL CONTRACTING, INC.[1]	)	
Employer	)	
and	)	Case No. 29-RC-11276
LOCAL 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO	)	
Petitioner	)	
and	)	
LOCAL 363, UNITED SERVICE WORKERS, TRANSPORTATION COMMUNICATION UNION, AFL-CIO	)	
Intervenor	)	

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

Millennium Maintenance & Electrical Contracting, Inc. ("Employer"; "Millennium") is engaged in the electrical contracting industry. Local 3, International Brotherhood of Electrical Workers, AFL-CIO ("Petitioner") filed a petition with the National Labor Relations Board, herein called the Board, under Section 9(c) of the National Labor Relations Act, herein called the Act, seeking to represent a bargaining unit consisting of all full-time and regular part-time electricians, electrical maintenance

[1] The names of all parties appear as amended at the hearing.

mechanics, helpers, apprentices, trainees and expediters employed by the Employer at its Brooklyn facility, but excluding all other employees, office clerical employees, managers, professional employees, guards and supervisors as defined in the Act.

The Employer is a member of the Building Industry Electrical Contractors Association ("Association"), which is party to a collective bargaining agreement, effective December 1, 2005, through November 30, 2008, with Local 363, United Service Workers, Transportation Communication Union, AFL-CIO ("Intervenor"; "Local 363"). Both the Intervenor and the Association intervened on the basis of this collective bargaining agreement, which encompasses the petitioned-for unit.

A hearing was held before Peter Pepper, a Hearing Officer of the Board. The parties appeared at the hearing and submitted briefs.[2] Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me.

The Employer, the Association and the Intervenor contend that the Association-wide multiemployer collective bargaining agreement is a 9(a) agreement, operating as a contract bar. The Petitioner argues that the Association-wide collective bargaining agreement is not a bar. All parties agreed that the unit sought by the Petitioner is an appropriate unit, in the event that the multiemployer agreement is found not to be a bar.

The witnesses on behalf of the Employer and the Association were Marcello Aspesi, president of the Employer, and Patrick Bellantoni,[3] president of the Association. Testifying on behalf of the Intervenor was Kevin Barry, president of the Intervenor. The Petitioner did not call witnesses.

[2] The Employer and the Association were represented by the same attorney.

[3] The transcript references to "Peter Dellantoni," starting at page 63, are hereby corrected.

I have considered the evidence and the arguments presented by the parties. As discussed in detail below, in light of the parties' refusal to provide the names of the Association's other employer-members, I am unable to conclude that the Association contract bars the petition herein, for the following reasons: (1) the record evidence is insufficient to establish that the Association contract embraces an appropriate unit, and (2) even if the Association contract is for an appropriate unit, the evidence fails to establish that the Association contract is a 9(a) agreement.

Accordingly, I have directed an election in the unit sought by the Petitioner. The facts and reasoning that support my conclusions are set forth below.

THE REFUSAL TO PROVIDE RELEVANT EVIDENCE

During the cross-examination of Kevin Barry, president of the Intervenor, the Petitioner asked him to supply the names of the Association's members. The Intervenor and Employer objected, and the Hearing Officer overruled their objections. The Intervenor and Employer then filed special appeals and requests for permission to file special appeals. I granted their requests for permission to file special appeals, but I denied their special appeals on the merits. However, Barry continued in his refusal to provide the requested information. The Hearing Officer warned that the refusal to answer questions at a hearing that have been ruled to be proper may be grounds for striking all testimony previously given by the witness on related matters. *See* NLRB Representation Case manual, section 1120; *see also The Smithfield Packing Company,*

Inc., 344 NLRB No. 1, slip op. at 83 (2004); *U.S. Plastics Corporation*, 213 NLRB 323, 341 (1974). In addition, the Hearing Officer advised the parties that the undersigned Regional Director would decide whether to strike such testimony.

The Petitioner then moved to strike Barry's testimony. During the cross-examination of Bellantoni, he, too, refused to provide the names of the Association's members. Bellantoni and Barry acknowledged that they are in possession of the requested information.

In their special appeals, the Intervenor and Employer made two arguments: (1) that the requested information was irrelevant, and (2) that providing the names of Association members would facilitate future unfair labor practices by the Petitioner. The second argument is purely speculative, and thus without merit. As for the first argument, the Employer argued in its special appeal that under *Donaldson Traditional Interiors et al.*, 345 NLRB No. 117, slip op. (November 30, 2005), "the names of the employer members of an association are not necessary to prove or disprove 9(a) status." However, *Donaldson* is factually distinguishable. In *Donaldson*, the Board found that 9(a) recognition was extended to the incumbent union by a multiemployer association, on behalf of all of its members simultaneously. *Donaldson*, 345 NLRB No. 117, slip op. at 3. In the instant case, by contrast, the Intervenor's president testified that the initial 9(a) recognition was extended by each individual employer-member. The circumstances under which this recognition was extended are highly relevant to the alleged 9(a) status of the Association agreement, as further discussed below. Thus, the failure to provide the names of the employer-members precluded the Hearing Officer from developing a full

record, as well as precluding the Petitioner from identifying potential witnesses capable of contesting the Intervenor's assertions.

The Intervenor's special appeal argues that under *Donaldson*, "The Board does not require specific proof that a particular association member is bound by the contract, but rather whether the particular employer is bound, in this case Millennium." However, in *Donaldson*, the Board relied on the testimony of several employer-members of a multiemployer association in concluding that a multiemployer bargaining unit was appropriate, inasmuch as "members of the group…indicated from the outset an unequivocal intention to be bound in collective bargaining by group rather than individual action." *Donaldson*, 345 NLRB No. 117, slip op. at 2 (quoting *Weyerhaeuser Co*., 166 NLRB 299 (1967)). In the instant case, by contrast, the refusal to provide the names of the employer-members precluded the Hearing Officer from developing a full record as to whether any of the Association members, other than the Employer, met the standard set forth in *Donaldson*.

Moreover, in *Donaldson*, the parties disclosed the names of all current members of the relevant multiemployer association, as well as addresses and names of principals. *Donaldson Traditional Interiors et al*., Case No. 29-RC-10336, slip op. at 6-7 (July 6, 2005)(Regional Director's Decision), *overruled on other grounds*, 345 NLRB No. 117 (November 30, 2005). At no point during the hearing in *Donaldson* did any party refuse to obey a Hearing Officer's ruling. In *Donaldson*, the Board's finding that "none of the testimony on which we rely was contradicted or rebutted," *Donaldson*, 345 NLRB No. 117, slip op. at 3 n. 7, was predicated on the Petitioner's (and Hearing Officer's) potential ability to identify further witnesses. In the instant case, by contrast, the refusal to

disclose the names of the Association's other members foreclosed access to the only witnesses capable of providing contrary testimony with respect to the issues raised by this case.[4]

Under these circumstances, it is unlikely that the Board would place any weight on the fact that the testimony of Barry and Bellantoni was not contradicted or rebutted, or infer that the evidence they withheld would be favorable to their cause. In any event, since I have reached the conclusion that the evidence is insufficient to establish that the Association-wide contract is a bar, it is unnecessary to strike the testimony of Barry or Bellantoni, nor will I draw an adverse inference pursuant to *Bannon Mills, Inc*., 146 NLRB 611, 613 n. 4 (1964), or *Control Services, Inc.*, 303 NLRB 481, 483 n. 13 (1991).

FACTS

The Employer's Operations

Marcello Aspesi, the Employer's president, testified that the Employer performs electrical service and maintenance work. Employees are generally hired on a permanent basis to work year-round, although there have been an unspecified number of layoffs and recalls, of an unspecified duration. The Employer does not use a hiring hall.

Bargaining History

Barry testified that the Employer recognized the Intervenor in 2002, based on a card check. On December 10, 2002, the Employer and Intervenor executed a collective bargaining agreement, effective December 1, 2002, through November 30, 2005, encompassing the Employer's electricians, electrical maintenance mechanics, helpers,

[4] The Employer's employees, and the Petitioner's own agents, were not potential witnesses, since they would have no way of knowing about the circumstances surrounding the unnamed employers' alleged 9(a) recognition of the Intervenor, or the circumstances surrounding any "intention to be bound by group bargaining" on the part of the unnamed employer-members.

apprentices and trainees ("the unit"). Addendums concerning welfare fund benefits were executed in July, 2003, and March, 2005.

On May 12, 2003, pursuant to a Board-conducted election, the Intervenor was certified as the exclusive collective bargaining representative of the employees in the unit described above. The Employer was located in Manhattan at that time, and subsequently moved to its current address.

In September, 2005, the Employer became a member of the Building Industry Electrical Contract Association ("Association"), pursuant to a membership application signed by Aspesi and approved by Bellantoni.

Previously, on July 1, 2004, the Intervenor and the Association entered into their first collective bargaining agreement, effective July 1, 2004, through November 30, 2007. The July 2004 Association contract is virtually identical to the contract executed on December 10, 2002, by the Employer and the Intervenor.

In November, 2005, the Association and the Intervenor entered into two virtually identical Memorandums of Agreement, effective December 1, 2005, through November 30, 2008, modifying and extending the two (virtually identical) contracts described above (the 2002 through 2005 agreement between the Intervenor and the Employer, and the 2004 through 2007 agreement between the Intervenor and the Association).

The Building Industry Electrical Contract Association

The record does not reveal when the Association was first established, and the constitution and by-laws were not produced at the hearing. The Association negotiated its first collective bargaining agreement in July, 2004.

According to Barry, there "could have been 30" employer-members in 2004, and there are "probably" more members now than in 2004. Bellantoni indicated that Millennium, which joined the Association in September, 2005, was "probably not" the most recent member to join the Association. Both Barry and Bellantoni refused to reveal the names of the other employer-members of the Association, as discussed in detail above.

The record does not disclose the geographical scope of the Association. With regard to the type of work performed by the Association's members, Barry testified as follows under cross-examination by the Petitioner:

> Q: Mr. Barry, do the contractors working under this collective bargaining agreement perform public works contracts covering either federal, state or municipal contracts?
>
> A: Yes, I think some contracts do perform prevailing rate and it could be construction. It could be maintenance. It could be telecommunications depending on what area they're in. Not necessarily construction.

Barry did not indicate what type of telecommunications work is performed by the unidentified members of the Association. Neither Bellantoni nor Aspesi provided any information regarding the type of work performed by the unnamed members of the Association. However, the July 1, 2004, Association contract indicates that "the Association is engaged in all areas, phases and facets of the electrical contracting industry."

Barry maintained that the members of the Association all employ full-time, permanent employees, and that Local 363 does not have a hiring hall.

Multiemployer Bargaining by the Association

The membership application signed by Aspesi in September, 2005, states that, "The Employer hereby designates the Association as its bargaining representative in all negotiations with Local 363 for its employees in the bargaining unit…and agrees to be bound by all the terms of any agreement entered into between the Association and Local 363 covering said employees with the same force and effect as though the Employer had executed the agreement as a party." However, the record does not reveal whether the other members of the Association signed a similar membership application, or whether they agreed to be bound by multiemployer bargaining prior to the negotiation of the Association contracts in 2004 and 2005. Nor does the record disclose whether other members of the Association consider themselves to be bound by the Association contract, or whether members of the Association are complying with the contract.

Aspesi testified that he participated in the contract negotiations in 2005, culminating in the two Memoranda of Agreement effective December 1, 2005, through November 30, 2008. Also present during the negotiations were Bellantoni and an unspecified number of other unnamed representatives of other unidentified employer-members. Aspesi testified that the Intervenor and the Association met for four bargaining sessions in 2005. The record does not reveal what occurred during these negotiations.

There was no testimony regarding the negotiations in 2004.

Alleged 9(a) Status of Association Agreement

Barry claimed that all Local 363 collective bargaining agreements are 9(a) agreements, deriving their 9(a) status from card checks or "majority status recognition." The record indicates that the Employer first recognized the Intervenor in 2002, based on a

card check, and joined the Association about three years later. However, the record does not reveal when or how the other employer- members of the Association first recognized the Intervenor.

Bellantoni testified as follows under direct examination:

> Q: Now how does it come [about] that you represent employers or [how does it come about that] employers join the Association?
>
> A: The union organizes shops and some of them decide to come into the Association at that point or some of them may sign individual contracts with the union.
>
> Q: Okay. Now what do you do when an employer seeks to join the Association?
>
> A: Well most employers or I'd say all employers that come they come from the union itself. The union certifies that they represent the majority of the people in the shop and then we'll sign them and give them an application to sign into the Association.

Bellantoni claimed that when an employer becomes a member of the Association, he checks to make sure that a majority of the employer's employees are members of the Intervenor. In the absence of an election certification, the Intervenor shows the Association "cards of representation showing that they have a majority of the people in the shop." However, Bellantoni acknowledged that he does not make or retain copies of the cards.

Article 1 (A) of the 2004 Association agreement states that "the Association and the Employers hereby recognize the Union is the sole and exclusive collective bargaining representative of all of the [unit employees]." It does not specifically state that this recognition is pursuant to Section 9(a) of the Act, or that the Intervenor has the support of a majority of the employees of each employer-member of the Association.

DISCUSSION

It is well settled that a collective bargaining agreement does not operate as a bar unless it embraces an appropriate unit. *Appalachian Shale* Products Co., 121 NLRB 1160, 1164 (1958). The test for evaluating the appropriateness of a multiemployer unit is well-established: "Essential to any finding that a multiemployer unit is appropriate are: (1) a controlling history of bargaining on a multiemployer basis for a substantial period of time, and (2) an unequivocal manifestation by the individual employers of a desire to be bound in future collective bargaining by group rather than individual action." *American Publishing Corporation et al.,* 121 NLRB 115, 121 (1958); *see Donaldson,* 345 NLRB No. 117, slip op. at 2; *Van Eerden Company*, 154 NLRB 496, 499 (1965); *Chicago Metropolitan Home Builders Association*, 119 NLRB 1184, 1186 (1957). "The ultimate question…is the actual intent of the parties, since multiemployer bargaining is a voluntary arrangement, dependent upon the real consent of the participants to bind themselves to each other for bargaining purposes." *Van Eerden Company*, 154 NLRB at 499.

In determining whether there has been a history of bargaining on a multiemployer basis:

> [A] mere agreement to bargain on such a basis is insufficient. Thus, however clear parties may have been in stating an intent to bargain on a group basis, if their conduct thereafter is inconsistent with this stated aim, [the Board] may be unable to find the evidence of unequivocal intent to 'be bound in collective bargaining by group rather than individual action' that is critical to establishing a history of multiemployer bargaining. *West Lawrence Care Center, Inc*., 305 NLRB 212, 215 (1991)(citations omitted).

For example, in *Rock Springs Retail Merchants Association*, 188 NLRB 261 (1971), although the association had more than 40 members, there were only five members who

consistently participated in negotiations and signed association agreements. *Rock Springs Retail Merchants*, 188 NLRB at 261. The other members considered the association agreements to be "binding upon them only after individual post hoc examination." *Rock Springs Retail Merchants*, 188 NLRB at 262. Although the five active members constituted a "true multiemployer group," the Board concluded that the remaining members were not part of this true multiemployer group, because they did not agree, at the outset, to be bound by the results of the association's bargaining. *Rock Springs Retail Merchants*, 188 NLRB at 261, 262.

By contrast, in *Donaldson*, relied on by the Employer and Intervenor herein, several members of a multiemployer association testified that members authorize the association "to negotiate on their behalf, to accept negotiated contract terms, and to sign a collective-bargaining agreement on their behalf." *Donaldson*, 345 NLRB No. 117, slip op. at 2. The evidence indicated that members are "automatically bound" by collective bargaining agreements negotiated by the association. *Donaldson*, 345 NLRB No. 117, slip op. at 2. Similar evidence was relied on by the Board in *Weyerhaeuser Company*, 166 NLRB 299 (1967), in which the "fully-bound nature" of a multiemployer association was found to be unimpaired by the exclusion of certain specific issues from group bargaining, or by a requirement that issues be resolved by a 75-percent vote of the members. *Weyerhaeuser Company*, 166 NLRB at 300.

Other factors in determining whether a multiemployer unit is appropriate include the duration of multiemployer bargaining, as well as the comparative duration of any previous history of single-employer bargaining. *Chicago Metropolitan Home Builders Association*, 119 NLRB 1184, 1186 (1957); *see Architectural Contractors Trade*

Association, 343 NLRB No. 39 (2004)(multiemployer unit was found appropriate, where members of a multiemployer association manifested an unequivocal intent to be bound by group action over a period of at least 9 years); *Centra, Inc.*, 328 NLRB 407 (1999) (multiemployer unit appropriate, where unit employees were represented on a multiemployer basis from 1986 until 1999, and previous single-employer bargaining history was from 1982 to 1986); *West Lawrence Care Center*, 305 NLRB at 216-217; *Van Eerden Company*, 154 NLRB at 499; *Miron Building Products Co*., 116 NLRB 1406, 1407-8; *Donaldson*, Case No. 29-RC-10336, slip op. at 5 (July 6, 2005)(multiemployer association had been in existence for 16 years).

In the instant case, there is no evidence that the unnamed employer-members manifested, from the outset, an unequivocal intention to be bound in future collective bargaining by group rather than individual action, or that they have engaged in such group action for a substantial period of time. The Employer has only been a member of the Association since September, 2005. The record does not reflect when the Association's other members joined, but Bellantoni, the Association president, acknowledged that Millennium was "probably not" the most recent member to join. The first collective bargaining agreement negotiated by the Association was in July, 2004. Further, the record does not disclose whether the other employer-members engaged in single-employer bargaining for a significant period of time, prior to joining the Association. In the absence of any such information regarding the unidentified employer-members, the appropriateness of the Association-wide unit encompassed by the contract cannot be ascertained.

Moreover, a multiemployer bargaining unit may not be appropriate if it encompasses a wide diversity of businesses that are geographically scattered, where the employees of the various employer-members of a multiemployer association have no contact with one another, there is no interchange or transfers, no integration of work functions or common supervision, and where the multiemployer contracts fail to reflect any particular industry-specific concerns. *Maramount Corp. et al*., 310 NLRB 508, 511 (1993). In the instant case (other than for the Employer), the Employer, the Association and the Intervenor failed to provide the names of the various employer-members of the Association, and there is no record evidence regarding contacts, interchange, transfers, work functions and supervision, or the geographical locations of the various employer-members. Although the Association contract indicates that it encompasses employers engaged in the electrical contracting industry, Barry testified that some members are in the telecommunications field, and in "maintenance." It is possible that some employer-members are engaged in industries that only incidentally employ unit employees. Because of the paucity of record evidence on this issue, attributable directly to the parties making the claim, I am unable to conclude that the unit encompassed by the Association-wide agreement constitutes an appropriate multiemployer unit.

Alleged Section 9(a) Status of Association Agreement

Although the Intervenor undeniably has Section 9(a) status with respect to the Employer's unit employees, pursuant to the Board-conducted election and certification, there is insufficient record evidence to determine whether the Intervenor has Section 9(a) status with regard to the other, unnamed members of the Association, or with respect to the Association-wide unit as a whole. Barry acknowledged that some members of the

Association are engaged in the construction industry. The 2004-2007 Association contract states that, "the Association is engaged in all areas, phases and facets of the electrical contracting industry." The Board has found electrical contractors to be "primarily engaged in the construction industry." *E.g, Daniel J. Ellis, d/b/a Ellis Electric*, 315 NLRB 1187 (1994); *Steiny and Company, Inc*., 308 NLRB 1323 (1992).[5] To the extent that any of the Association's unnamed employer-members are primarily engaged in the construction industry, there is a rebuttable presumption that their bargaining relationship with the Intervenor is governed by Section 8(f) of the Act, and not by Section 9(a).

Section 8(f) of the Act provides:

> ***It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement***, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act; ***Provided further, That***

[5] *Frick Company*, 141 NLRB 1204, 1208 (1963), cited by the Intervenor herein, held that an employer whose major source of revenue was derived from the manufacture and sale of refrigeration equipment was not primarily engaged in the construction industry. Thus, *Frick* has no bearing on the status of electrical contractors. Although the Employer and Intervenor place great emphasis on the absence of a Local 363 hiring hall, and the alleged employment of permanent employees by the unidentified Association members, they have not cited a single case holding that an employer engaged in the electrical contracting industry is not engaged in the construction industry. Indeed, a recent unfair labor practice case involving the Employer referred to one of its electricians as a "construction worker." *Millennium Maintenance & Electrical Contracting, Inc*., 344 NLRB No. 62, slip op. (2005).

> ***any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).*** (emphasis supplied)

In effectuating the public policy considerations underlying Section 8(f), the Board has sought to achieve "an appropriate balance between the dual congressional objectives of promoting and maintaining employee free choice principles and labor relations stability in the construction industry." *John Deklewa & Sons*, 282 NLRB 1375,1382 (1987). In the interest of labor relations stability, *Deklewa* held that neither an employer nor a union may repudiate an 8(f) agreement prior to its expiration date, in the absence of a decertification election. *Deklewa*, 282 NLRB at 1385. However, *Deklewa* emphasized that Congress also "sought to assure that the rights and privileges accorded employers and unions in the body of Section 8(f) would not operate to thwart or undermine construction industry employees' representational desires." *Deklewa*, 282 NLRB at 1380-81. The second proviso, specifying that "an 8(f) agreement may not act as a bar to, *inter alia*, decertification or rival union petitions," was intended to be "an 'escape hatch' for employees subject to unwanted representation imposed before they were hired." *Deklewa*, 282 NLRB at 1381, 1382.

The "conversion doctrine" applied by the Board prior to *Deklewa* "contravene[d] Congress's intent to provide employees with a meaningful and readily available escape hatch," inasmuch as it permitted "the extraordinary 'conversion' of such nonbinding [8(f)] relationships into full-fledged, wholly enforceable 9(a) relationships constituting an absolute bar to employees' efforts to reject or to change their collective bargaining representative." *Deklewa*, 282 NLRB at 1382. After an 8(f) agreement was signed, a labor organization's "conversion" from 8(f) to 9(a) status could be "almost

instantaneous" under pre-*Deklewa* rules. *Deklewa*, 282 NLRB at 1383. This was because the finding that a union enjoyed majority support, permitting the conversion to 9(a) status, was often based on a "highly questionable factual foundation," such as the presence of an enforced union-security clause, or the actual union membership of a majority of unit employees. *Deklewa*, 282 NLRB at 1383-84. Realistically, the Board observed, "union membership is not always an accurate barometer of union support," nor is "a union security clause [that] operates to compel new employees to join the union because union membership is the price for obtaining a job." *Deklewa*, 282 NLRB at 1383-84 (citations omitted). In sum, *Deklewa* abandoned the conversion doctrine because it "render[ed] the second proviso nugatory," and it "hardly advance[d] the objective of employee free choice." *Deklewa*, 282 NLRB at 1383.

Accordingly, after *Deklewa*, the Board "will require the party asserting the existence of a 9(a) relationship to prove it." *Deklewa*, 282 NLRB at 1385 n. 41; *see Donaldson*, 345 NLRB No. 117, slip op. at 2; *Central Illinois Construction*, 335 NLRB 717, 718 (2001)(Board continues to hold that there is "a rebuttable presumption that a bargaining relationship in the construction industry was established under Section 8(f), with the burden of proving that the relationship instead falls under Section 9(a) placed on the party so asserting."). Section 9(a) status can only be established through a Board election, *Deklewa*, 282 NLRB at 1385, or through "voluntary recognition accorded to a union by the employer of a stable work force where that recognition is based on a clear showing of majority support among the union employees, e.g., a valid card majority." *Deklewa*, 282 NLRB at 1387 n. 53; *see Central Illinois Construction*, 335 NLRB at 718.

In addition, it is well settled that the showing of majority support must be contemporaneous with the grant of 9(a) recognition. *Donaldson,* 345 NLRB No. 117, slip op. at 2; *Central Illinois Construction,* 335 NLRB at 720; *H.Y. Floors & Gameline Painting*, 331 NLRB 304 (2000)); *Golden West Electric*, 307 NLRB 1494, 1495 (1992); *Comtel,* 305 NLRB at 291.

In the multiemployer context, *Deklewa* held that "employees of a single employer cannot be precluded from expressing their representational desires simply because their employer has joined a multiemployer association." *Deklewa,* 282 NLRB at 1385 n. 42. The act of joining a multiemployer association and assenting to a multiemployer agreement does "not make [an employer] subject to a 9(a) relationship with [a union or] merge its employees into the larger unit unless majority support among the [single employer's] employees was manifested prior to that assent." *Comtel,* 305 NLRB at 290. Accordingly, to establish that a multiemployer agreement has 9(a) status, majority support must be established with respect to each individual employer-member of a multiemployer group. *Donaldson,* 345 NLRB No. 117, slip op. at 2; *Comtel,* 305 NLRB at 287-90; *Kephart Plumbing, Inc.*, 285 NLRB 612, 612 (1987).[6] If such a showing is not made, single employer units remain the appropriate unit. *Comtel Systems Technology, Inc*., 305 NLRB 287, 289 (1991); *Deklewa,* 282 NLRB at 1377, 1385. However, if an employer is part of a multiemployer bargaining relationship governed by Section 9(a), the multiemployer bargaining unit is the only appropriate unit, and

[6] The Intervenor and Employer argue that if an incumbent union has 9(a) status with respect to just one member of a multiemployer association, the entire multiemployer agreement should be considered a 9(a) agreement. This approach would curtail the Section 7 rights of the employees of all other members of the multiemployer association.

"petitions for single-employer components of a multiemployer association will not be entertained." *Donaldson,* 345 NLRB No. 117, slip op. at 3.

In *Donaldson,* the Board re-articulated its standards for establishing 9(a) status as follows:

> To establish that a union has achieved 9(a) majority status, the Board requires evidence that the union unequivocally demanded recognition as the employees' 9(a) representative, and that the employer unequivocally accepted the demand for recognition. The Board also requires a contemporaneous showing of the union's majority support among the employer's employees, or a showing that the employer acknowledged and accepted that the union enjoyed majority support. *Donaldson,* 345 NLRB No. 117, slip op. at 2 (citing *H.Y. Floors & Gameline Painting*, 331 NLRB 304 (2000); *Oklahoma Installation Co*., 325 NLRB 741, 742 (1993), *enf. denied* 219 F.3d 1160 (10th Cir. 2000); *Golden West Electric*, 307 NLRB 1494 (1992)).

Further, *Donaldson* held that in the context of an 8(f) multiemployer association agreement, the multiemployer association may extend 9(a) recognition on behalf of its individual employer-members. *Donaldson,* 345 NLRB No. 117, slip op. at 3. More specifically, the incumbent union in *Donaldson* offered to show union authorization cards to the president of the multiemployer association with which it had an 8(f) agreement. *Donaldson,* 345 NLRB No. 117, slip op. at 2-3. The association president, acknowledging that the incumbent union had majority status with respect to each member of the association, declined to look at the authorization cards or check them against the employer-members' payroll records. *Donaldson,* 345 NLRB No. 117, slip op. at 2-3. The multiemployer agreement was held to be a 9(a) agreement. *Donaldson,* 345 NLRB No. 117, slip op. at 3.

The instant case is distinguishable from *Donaldson*. Both Barry and Bellantoni testified that each individual employer-member extended 9(a) recognition to the Intervenor *before* joining the Association (more specifically, three years before in the

case of Millennium). Subsequently, when a company applies for membership in the Association, Bellantoni checks the Board certification (if any) or the authorization cards to make sure that a majority of the employees are members of the Intervenor.

However, it is well established that for a union to have 9(a) status, it must have majority support *on the day that recognition is extended*. *Comtel*, 305 NLRB at 291; *see Donaldson*, 345 NLRB No. 117, slip op. at 2; *Central Illinois Construction*, 335 NLRB at 720; *H.Y. Floors & Gameline Painting*, 331 NLRB 304 (2000)); *Golden West Electric*, 307 NLRB 1494, 1495 (1992). The record evidence does not reveal when each unnamed Association member recognized the Intervenor, much less whether it was through a Board certification, a card check, or an acknowledgement by the employer. Since the identities of the other employer-members were not disclosed, and since the Intervenor did not disclose the facts or circumstances surrounding the alleged 9(a) recognition extended by the unidentified employer-members of the Association, it was not possible for the Hearing Officer to develop a factual record on this crucial issue. If the circumstances surrounding the initial recognition by the individual employer-member were inadequate to convey 9(a) status, the subsequent card check by Bellantoni proves nothing.

Moreover, as discussed previously, the *Donaldson* decision stressed that "none of the testimony on which [the Board] rel[ied] was contradicted or rebutted." *Donaldson*, 345 NLRB No. 117, slip op. at 3 n. 7. Had there been contrary evidence establishing that the incumbent union in *Donaldson* did not, in fact, have the support of a majority of the employees of each member-employer at the time of recognition, the Board might have reached a different conclusion. In *Donaldson*, such contrary evidence could have been sought or obtained by either the Petitioner or the Hearing Officer, since a list of current

employer-members, their addresses, and the names of their principals, was made available at the hearing. *Donaldson*, Case No. 29-RC-10336, slip op. at 6-7 (July 6, 2005). In the instant case, by contrast, the failure to provide the names of the employer-members made it impossible for either the Petitioner or the Hearing Officer to investigate whether such contrary evidence exists.[7] Accordingly, the Board is unlikely to rely on the fact that the testimony of Barry and Bellantoni was not contradicted or rebutted.

In sum, although the Intervenor undeniably has 9(a) status with respect to the Employer, pursuant to the Board election and certification, the record evidence is insufficient to establish that the Intervenor has 9(a) status with respect any other member of the Association. Therefore, I am unable to conclude that the multiemployer Association agreement operates as a bar to the instant petition.

Summary of Legal Findings

Because the Employer, the Association and the Intervenor have refused to provide the names of the Association's members, the composition of the multiemployer unit encompassed by the Association contract is unknown. Thus, it was not possible to develop a full record with respect to the appropriateness of the multiemployer unit, or the Intervenor's alleged 9(a) status with respect to the broader unit. For these reasons, I am unable to conclude that the Association contract bars the petition herein, and I will direct an election in the unit sought by the Petitioner.

CONCLUSIONS AND FINDINGS

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

[7] Since the Intervenor has 9(a) status with respect to the Employer, pursuant to the Board election and certification, any such contrary evidence would have to be obtained from employees or agents of the unidentified Association members.

2. The parties stipulated that Millennium Maintenance and Electrical Contracting, Inc., herein called the Employer, a domestic corporation, with its principal office and place of business located at 201 Franklin Street, Brooklyn, New York, herein called the Brooklyn facility, has been engaged in the business of electrical contracting. During the past year, which period is representative of its annual operations generally, the Employer, in the course and conduct of its business operations, has purchased and received at its Brooklyn facility, goods, products and materials valued in excess of $50,000, directly from suppliers located outside the State of New York.

Based upon the stipulations of the parties, and the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Petitioner and Intervenor are labor organizations within the meaning of Section 2(5) of the Act. The labor organizations involved herein claim to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employers within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time electricians, electrical maintenance mechanics, helpers, apprentices, trainees and expediters employed by the Employer at its Brooklyn facility, EXCLUDING all other employees, office clerical employees, managers, professional employees, guards and supervisors as defined in the Act. [8]

[8] The parties did not take positions on whether to apply the eligibility formula set forth in *Steiny and Company, Inc*., 308 NLRB 1323 (1992), and *Daniel Construction Company, Inc*., 133 NLRB 264 (1961), *as modified*, 167 NLRB 1078 (1967).

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notices of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States who are employed in the unit may vote if they appear in person at the polls.

Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

Those eligible to vote shall vote whether they desire to be represented for collective bargaining purposes by Local 3, International Brotherhood of Electrical Workers, AFL-CIO, Local 363, United Service Workers, Transportation Communication Union, AFL-CIO, or by neither labor organization.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc*., 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB No. 50 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor, Brooklyn, New York 11201 on or before **February 13, 2006**. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notices of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. The Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days

prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB No. 52 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the elections whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **February 20, 2006.** The request may be filed by electronic transmission through the Board's web site at NLRB.Gov but **not** by facsimile.

Dated: February 6, 2006, Brooklyn, New York.

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Alvin P. Blyer
Regional Director, Region 29
National Labor Relations Board
One MetroTech Center North, 10th Floor
Brooklyn, New York 11201